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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. FERNANDO ORTIZ, Defendant and Appellant.	B285431 (Los Angeles County Super. Ct. No. BA439420)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Affirmed.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Fernando Ortiz appeals from a judgment entered after a jury found him guilty of murdering Anthony Carlos. Ortiz contends the trial court improperly refused to allow him to retake the stand. He also contends the trial court erred in excluding certain evidence and in its jury instructions. Because we find no error, we affirm.

BACKGROUND

On the afternoon of August 27, 2015, Ortiz pulled up behind Carlos's vehicle at a stop sign and honked. Carlos got out of his truck and gestured at Ortiz with his middle finger. Ortiz shot and killed Carlos.

Ortiz testified that he was under the influence of methamphetamine when he shot Carlos. Ortiz had a substantial amount of the drug with him in his vehicle, and he claimed he was nervous and thought he might have been set up to be robbed by someone who knew he had the drugs with him. He also testified that he believed he saw Carlos jump out of his vehicle with a gun in his hand.

The investigating officers discovered no gun on or near Carlos's body, and no other witness testified that Carlos had a weapon.

The People filed an information on May 25, 2016 alleging one count of murder under Penal Code section 187,[1] subdivision (a) and one count of possession of a firearm by a convicted felon under section 29800, subdivision (a)(1). The People also alleged that Ortiz personally used and personally and intentionally discharged a firearm to commit murder, in violation of section 12022.53, subdivisions (b), (c), and (d).

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

The trial court impaneled a jury on July 17, 2017. Before opening statements, Ortiz pled guilty to the felon in possession of a firearm count, leaving only the murder charge and accompanying firearm allegations to be tried to the jury.

The jury returned its verdict on July 24, 2017, finding the defendant guilty of first degree murder, and finding true the personal use and personal and intentional discharge of a firearm allegations associated with the murder charge. Based on the jury verdict and Ortiz's guilty plea to the felon in possession of a firearm charge, on September 28, 2017, the trial court sentenced the defendant to 50 years to life on the murder charge and a consecutive eight months on the felon in possession of a firearm charge.

Ortiz filed a timely notice of appeal.

DISCUSSION

A. Trial court's refusal to allow Ortiz to retake the stand

Ortiz testified that he was under the influence of methamphetamine when he shot Carlos. After Ortiz testified, the trial court asked whether the defendant rested subject to the admission of exhibits. Ortiz's attorney responded: "No, your honor. Subject to tomorrow."

The trial court sent the jury home for the rest of that day and began discussing jury instructions. During that discussion, Ortiz requested that CALJIC No. 4.21 regarding voluntary intoxication be given.[2] Ortiz contended that he had testified that

[2] To support his argument that the trial court should have allowed him to retake the stand, Ortiz argues that the trial court also erred in giving CALJIC No. 4.21 to the jury. Ortiz requested

he was "high on meth[amphetamine]" when he shot Carlos and that was sufficient to warrant giving CALJIC No. 4.21.

The trial court received written argument from the People and Ortiz regarding CALJIC No. 4.21 and whether there was evidence in the record sufficient to warrant giving the voluntary intoxication instruction to the jury. The morning following Ortiz's request that the trial court give the jury CALJIC No. 4.21, Ortiz informed the trial court that he would be retaking the stand to testify about his methamphetamine intoxication when he shot Carlos.

Rather than have Ortiz recalled, the People suggested that the trial court give the voluntary intoxication instruction. The trial court accepted the People's suggestion, gave the jury CALJIC No. 4.21.1,[3] and denied Ortiz's request to testify further.

The People contend this question must be examined under Evidence Code section 778 because, they say, Ortiz had been excused as a witness after he testified.[4] Ortiz points out that the

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CALJIC No. 4.21 and only objected to not being allowed to retake the stand to testify about his mental state.

[3] The trial court instructed the jury with both CALJIC Nos. 4.21 and 4.21.1. The trial court then instructed the jury to ignore No. 4.21 and follow No. 4.21.1 because "4.21 deals with specific intent crimes, and 4.21.1 deals with general intent and specific intent crimes. Since we have both of them, that is the one that should be read. The other one just says the same thing as to specific intent crimes."

[4] Evidence Code section 778 states: "After a witness has been excused from giving further testimony in the action, he cannot be recalled without leave of the court. Leave may be granted or withheld in the court's discretion."

trial court did not "excuse" the witness, but rather asked the defense if it rested; it did not. Therefore, Ortiz contends, Evidence Code section 774 governs whether Ortiz was entitled to retake the stand to testify about the state of his intoxication.[5]

The parties agree that we review the trial court's decision for an abuse of discretion.

Ortiz's argument is that the trial court's refusal to allow him to retake the stand to give further testimony regarding his mental state and the effect of methamphetamine on it denied him the opportunity to present a complete defense. (See *Crane v. Kentucky* (1986) 476 U.S. 683, 690-691 (*Crane*).) We disagree.

Crane dealt with a motion in limine and resulting "wholesale exclusion of [a] body of potentially exculpatory evidence." (*Crane*, *supra*, 476 U.S. at p. 691.) This case does not. Here, Ortiz testified about having taken methamphetamine; in fact, he testified that he was high on methamphetamine. He has argued here (on another point): "The effects of drugs and alcohol have become the subject of common knowledge among laypersons. [Citations.] It is commonly known that methamphetamine heightens mental processes and makes the user agitated and aggressive."

The trial court here did not deny Ortiz the opportunity to testify about his methamphetamine use or even, had he chosen to do so, about the effect methamphetamine had on him or his mental state when he shot Carlos. To the contrary, Ortiz

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[5] Evidence Code section 774 states: "A witness once examined cannot be reexamined as to the same matter without leave of the court, but he may be reexamined as to any new matter upon which he has been examined by another party to the action. Leave may be granted or withheld in the court's discretion."

requested, *after he finished testifying*, and *after the trial court revealed how it viewed the state of the evidence in the context of a jury instruction it ended up giving*, to *retake* the stand and offer *more* testimony on subjects about which he had already testified. The "complete defense" argument is inapposite; Ortiz presented the defense he chose to present and was not prevented from doing so.

While other judges might have made a different choice and allowed Ortiz to retake the stand, nothing Ortiz has argued here has established that the trial court abused its discretion by instructing the jury as Ortiz requested, refusing to allow him to retake the stand, and allowing him to argue to the voluntary intoxication instruction in closing.

B. The trial court's exclusion of evidence regarding the victim's methamphetamine use

Ortiz contends that one of the reasons he shot Carlos was that Carlos's actions provoked Ortiz. At trial, Ortiz attempted to question the coroner about whether there was any methamphetamine in Carlos's body at the time of Carlos's autopsy because, Ortiz argues, "[i]t is commonly known that methamphetamine heightens mental processes and makes the user agitated and aggressive." The trial court excluded on relevance grounds the testimony Ortiz was trying to elicit from the coroner about Carlos's toxicology. The trial court told Ortiz that "[i]f the evidence you produce shows [that Carlos's toxicology is] relevant, then I'll consider [admitting] it. But at the moment it's not relevant."[6]

[6] There is no evidence in the record that suggests the victim had any methamphetamine in his system.

There was no evidence offered that would have made the victim's toxicology relevant. Ortiz testified that he believed Carlos had a gun and had acted aggressively toward Ortiz after Ortiz honked at him. But Carlos had no gun. And Ortiz was inside a vehicle when he shot Carlos, who had exited his own vehicle. The record is devoid of evidence to support Ortiz's claim that Carlos was acting aggressively, and that is the only reason Ortiz contends the victim's toxicology is relevant.

The trial court did not abuse its discretion by excluding evidence about whether Ortiz's victim had methamphetamine in his body at the time of the autopsy.

C. Instruction error regarding provocation

1. Manslaughter via Provocation

Ortiz contends on appeal that the trial court should have instructed the jury regarding manslaughter via provocation. Ortiz argues that because he testified that Carlos provoked him by gesturing with his middle finger after Ortiz honked at him, there is substantial evidence in the record to support a provocation instruction, and the trial court erred by not giving that instruction.

The evidence here is not sufficient to support Ortiz's requested provocation instruction, and the trial court was not required to instruct on that theory. (See *People v. Breverman* (1998) 19 Cal.4th 142, 162.) "The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average

disposition to act rashly or without due deliberation and reflection." (*People v. Manriquez* (2005) 37 Cal.4th 547, 583-584 (*Manriquez*).) In *Manriquez*, the Supreme Court explained that the provocation instruction at issue here has a subjective and an objective component.

Carlos's conduct here—gesturing at Ortiz with his middle finger and exiting his vehicle—though perhaps rude, was not sufficiently provocative under the *Manriquez* standard to warrant giving the requested provocation instruction. The trial court did not err by refusing to do so.

2. Definition of Provocation

Ortiz contends that the trial court erred by not sua sponte giving the jury a definition of provocation in conjunction with CALJIC No. 8.73, which employed that term.

Ortiz relies on the premise that a trial court has a duty to instruct jurors correctly when it instructs: "once a trial court undertakes to instruct the jurors on a topic of law, it must do so correctly." Ortiz's contention, however, is not that CALJIC No. 8.73 is incorrect, but rather that it is *incomplete* without a definition of provocation.

Ortiz did not raise this argument in the trial court, and did not request further instruction regarding the definition of provocation in the trial court. Ortiz "did not ask the trial court to clarify or amplify the instruction. Thus, he may not complain on appeal that the instruction was incomplete." (*People v. Cole* (2004) 33 Cal.4th 1158, 1211.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.